ADDITIONAL BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

PRELIMINARY STATEMENT.

The two decisions rendered by this Court on March 15, 1943 in the Chicago, Milwaukee, St. Paul & Pacific Railroad Company Reorganization, and in the Western Pacific Railroad Corporation Reorganization, make it necessary for us to apply for leave to file an additional brief, in view of the position taken by this Court on certain matters which are also involved in the reorganization of the debtor.

We also desire to bring to the attention of this Court that as attorneys for the Adjustment Mortgage Bondholders in the Milwaukee Reorganization case, we intend to file a Petition for a Rehearing, and the matters to be presented in such petition are also pertinent on the issues raised in the instant case, and to avoid repetition, we will ask this Court to consider the points raised in the Petition for Rehearing in connection with the application for Writs in this case.

I.

While The Changed Conditions By Reason Of War Earnings May Not Be Considered To Change The Speculative Normal Year, They Should Be Considered To Change The Allotment To The Convertible Bonds Because Of The Actual Increase Of The Assets Resulting From The Increased Revenue Already Received.

This Court determined in the *Milwaukee* case that there was no sufficient showing of changed conditions as a

result of war earnings to affect the "normal year" to *speculate* on an increase in the capitalization. The Debtor filed three motions to consider the changed conditions, and we filed a motion to adopt the Supplemental Record in connection with our petitions for Writs of Certiorari which are pending here.

We are not asking this Court to consider the changed conditions for *speculative* purposes to change the "normal year" in order to allot securities on such *speculation,* but to consider the changed conditions for the purpose of allotting additional stock in the amount of $40,790,912, which the Commission failed to issue because of its capitalization, which was based on the then existing assets of the Debtor. The Debtor's assets *are now increased from the earnings by assets in excess of that amount.*

The capitalization was based on the 1937 total assets of $682,170,380. The net assets as of 1943 amount now, as a result of *actual earnings,* to $742,747,217, being an *increase of* $79,577,937, as shown by Exhibit "A" attached to the Debtor's Motion of March 20, 1943. Regardless, therefore, of the question whether the changed conditions are sufficient to change the capitalization on a speculative "normal year," *there is a sufficient showing to increase the allotment* to the convertible bond owners for their deficiency in excess of $40,000,000 under the present plan.

The plan of reorganization fixed the maximum limits of capitalization at $449,974,309, but the Commission authorized the issuance of only $423,774,309 of the new securities in exchange for the old securities, so that *this latter figure must be taken as its valuation of the assets.*

The current assets upon which the valuation was based in 1937 were $24,293,616. These increased to $28,533,540

on February 29, 1940 (R. 1469), and increased on January 31, 1943 to $89,009,584 (See Debtor's Supplemental Record). The increase in the "current assets" *of over* $60,000,000, and the increase in the *physical assets* of over $79,000,000, warrants the issuance of additional securities required to take care of the $40,790,912 of Convertible Bonds for which no allotment was made under the present Plan (R. 3677).

It should be also be considered that during the bankruptcy proceedings and subsequent to the adoption of the Plan, there has been redemption of debts in the amount of $25,457,592 and payments of interest totaling $26,705,455.

These changes in the financial *liquid* position and assets which are not based on a speculative "normal year," but on *actual increase in assets,* warrant remanding the proceedings to determine whether in the opinion of the Commission modification should be made in the Plan, insofar as it affects the Convertible Bonds.

II.

There Is No Basis For The Low Capitalization Of $423,774,309.

The conclusion of this Court in the *Milwaukee* case that the capitalization amounts to a valuation of the securities to be issued should be considered in connection with the action of the Commission taken in 1934 shortly before the Debtor filed its reorganization petition, when it reached a different conclusion as to the valuation. (*Chicago & North Western Railway Company Reconstruction Loan,* 202 I. C. C. 347.) There the Commission said:

> "It is reasonably capitalized, as evidenced by an investment of approximately $643,518,851 and capital

liabilities in the amount of $527,688,900. Its corporate surplus on December 31, 1933, was $39,387,231."

The Commission further stated in that report:

"It is possible that its resources may not prove to be sufficient to carry it on and into better times. But its record in the past and the nature of its difficulties are such as to lead us to believe that the applicant's present need is not reorganization of capital structure so much as it is an opportunity with reasonable aid to work out its problems."

This aid has now been supplied from the *actual earnings* as shown by the Supplemental Record.

In another report of the Commission dated September 29, 1934 (*Chicago & North Western Railway Company Reconstruction Loan,* 202 I. C. C. 271), the Commission said:

"In view of the conservative relation of the applicant's debt to probable property valuation, and its high earnings previous to the present depression, we are of the opinion that a financial reorganization of the applicant is not required in the public interest at this time."

The views expressed by the Commission in the above reports, plus the changed conditions in the cash position and current assets deserve a reconsideration of the Plan which was adopted when the corporation was temporarily embarrassed.

III.

The Debt Of The Reconstruction Finance Corporation Should Be Paid And The Pledged Omaha Bonds Aggregating $45,186,000 Should Be Subjected To The Lien Of The Convertible Bonds.

Point II of the brief in support of the petition in the instant case urged upon this Court that the Convertible

Bonds were entitled to a lien on the Omaha bonds aggregating $45,186,000, which were pledged as security by the Debtor with the Reconstruction Finance Corporation. It was urged that the Debtor wrongfully pledged this security with the Reconstruction Finance Corporation, when such bonds belonged to the Convertible Bond Owners, and that if the pledge be deemed proper, the Convertible Bond Owners should be entitled to the equity, after payment of the debt to the Reconstruction Finance Corporation. Now it appears that there is sufficient money on hand to discharge the whole debt to the R. F. C. and the point made by the petitioners in their brief on the right of the Convertible Bond Owners to be subrogated to the lien on the Omaha bonds has much greater force. We ask this Court, therefore, to consider the status of the cash position of the Debtor, as of the present date, in connection with the argument in the petition on the right of subrogation, irrespective of the affirmance of the plan in any other respects.

For the foregoing reasons, we urge the issuance of the Writs.

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CERTIFICATE OF SERVICE OF COPIES OF MOTION ON COUNSEL FOR RESPONDENTS.

I, Meyer Abrams, Counsel for the Petitioners herein, hereby certify that copies of the foregoing motion and annexed brief were duly served on each of the attorneys of record by mailing printed copies thereof by regular United States Mail, postage prepaid, on April 1, 1943.

MEYER ABRAMS.

Dated at Chicago, Illinois,
this 1st day of April, 1943.